STERLING GOLD (PRIVATE) LIMITED
versus
THE SHERIFF OF THE HIGH COURT (NO)
and
LM AUCTIONEERS (PRIVATE) LIMITED
and
CLEOBAND INVESTMENTS (PVT) LTD
A company under corporate rescue in terms of the **Insolvency Act**
**[Chapter 6:07]** represented herein by **BONGANI NDHLOVU NO) BP NO 0200243478**

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 7 & 11 August 2023

**Urgent Chamber Application- *Declaratur* and Interdict**

*R G Zhuwarara with T P Jonasi*, for the applicant
*A Mugandiwa*, for the 1st respondent
*A Chatsama*, for the 3rd respondent

**MUSITHU J:**

This urgent chamber application is fashioned as one for a *declaratur* and alternatively an interim interdict pending the determination of the rights of the parties on the return day. Two draft orders were filed. One in support of the relief for a *declaratur* and the other in support of the relief for an interim interdict. The one in support of the *declaratur* is couched as follows:

> "**IT IS ORDERED THAT**
> 1. The 1st Respondent cancellation of the sale on the 7th of July 2023 and 11 July 2023 by the 1st Respondent, between the Applicant and the 4th Respondent and be and is hereby declared null and void.
> 2. The contract of sale entered into between the Applicant and Respondents be and is hereby declared valid.
> 3. Costs of suit."

The draft order in support of the alternative relief reads as follows:

"**TERMS OF FINAL ORDER SOUGHT**

That you show cause to this Honourable Court why a final order should not be made in the following terms;

1. The 1st Respondent cancellation of the sale on the 7th of July 2023 and 11 July 2023 by the 1st Respondent, between the Applicant and the 4th Respondent and be and is hereby declared null and void.
2. The contract of sale entered into between the Applicant and Respondents be and is hereby declared valid.
3. Cost of suit.

**INTERIM RELIEF GRANTED**

Pending the return date of this matter, the Applicant is granted the following relief;

1. The 1st Respondent is directed to stop transferring delivering, auctioning, advertising for sale, of the movable property sold in execution on the 1st of July 2023 at Antelope 1 registration number 19413 Bobs Area, Kwekwe namely a processing plaint consisting of loading bin, crusher, vibrator, separator/sieve, siemens crusher, 2 x Hammer mills + separator, container control room with 3 x Powwer control boxes.
2. The 2nd Respondent is directed to stop auctioning the movable property paid for in full by the Applicant.
3. The 1st Respondents shall pay cost of suit at an attorney-client scale.

**SERVICE OF THE PROVISIONAL ORDER**

Service of the Provisional Order shall be effected by the Applicant's Legal Practitioners."

The application was opposed by the first and third respondents. The parties first appeared before me on 19 July 2023. The third respondent, a party in earlier proceedings that gave birth to the present matter had not been cited as a party herein. It was joined as third respondent by consent of all the parties on 19 July 2023. The matter was postponed to 28 July 2023 and later to 7 August 2023, to allow service of the application on the third respondent. The postponement would also allow the respondents time to file opposing papers.

**Background to the application and the applicant's case**

On 20 January 2022 an entity called Chigami 2 Syndicate obtained judgment against the third respondent under case HC1840/21. That judgment led to the attachment of the third respondent's equipment by the first respondent. Sometime in June 2023, the second respondent

advertised the sale of the third respondent's property in situ on 1 July 2023. The property to be sold comprised of a processing plant consisting of loading bin, crusher, vibrator, separator/sieve, siemens crusher, 2 x hammermills and separator, container control room with 3 x power control boxes (hereinafter called the equipment).

The applicant was represented at the auction and it emerged as the second highest bidder. The first bidder withdrew for reasons unknown to the applicant. On 3 July 2023, the applicant as the second highest bidder was advised to pay the sum of **US$195 000** for the equipment. The applicant claims that because of the short notice, and because it had resigned to having lost out in the bidding process, it was not possible to make the payment for the entire amount on the same day. The applicant and the auctioneer agreed that payments could be made with no cutoff date.

On 5 July 2023, the applicant made the first payment of US$150 000 into the first respondent's bank account. The second and last payment of US$45 000 was made on 7 July 2023. The applicant made a further payment of US$19 500 to the second respondent as its commission. A further payment of ZW$15 463 684.08 was made towards Value Added Tax.

On 7 July 2023, the applicant was informed by the first respondent that the sale had been cancelled. That communication was made through a letter from the first respondent to Mutatu and Partners Legal Practitioners, who were the judgment creditor's legal practitioners. The letter was copied to the second respondent and a Mr W Manyika representing the applicant. The reason given for the cancellation was that the applicant had only managed to pay US$150 000, leaving an outstanding balance of US$93 750 and the second respondent's commission of 25%. The letter requested Manyika to furnish his banking details for the refund of the sum of US$150 000. The letter also called upon the second respondent to re-advertise and sell in execution the attached property on 12 July 2023.

The applicant's legal practitioners of record responded to the first respondent's letter through their letter of 7 July 2023. They challenged the cancellation of the contract arguing that the applicant had paid the purchase price in full by 7 July 2023, when the purported cancellation was done. They also challenged the auctioneer's 25% commission arguing that it was way above the regulated rate of 10%. Their client was prepared to pay the 10% commission forthwith and take possession of the equipment. They gave the first respondent a 24 hour ultimatum to confirm

that the sale remained valid following the payment of the full purchase price failing which they would pursue the litigation route.

The first respondent responded to the applicant's letter through its own letter of 11 July 2023. It reiterated its earlier position that the sale was cancelled as the applicant had failed to pay the full purchase price nor had it sought an extension to do so before a decision to cancel the sale was made. The letter added that at any rate, the sale in execution was stayed by the provisional order granted by FOROMA J on 7 July 2023. The letter further requested the applicant's legal practitioners to furnish the first respondent with applicant's banking details to facilitate the refund of the purchase price.

The second respondent flighted an advertisement for another sale in situ on 12 July 2023. It is this further development that triggered this approach to this court on an urgent basis. The applicant contends that the first and second respondents' conduct is irregular as they seek to resell the same equipment that was fully paid for by the applicant. The applicant further contends that it was not even a party to the proceedings that gave birth to the order granted by FOROMA J.

I need to briefly relate to the provisional order granted by FOROMA J in HC 4415/23. The third respondent herein was the applicant in that matter. The first respondent herein was the first respondent in that matter. Chigami 2 Syndicate, the judgment creditor of the third respondent herein was the second respondent. The Master of the High Court and the Registrar of Companies were the third and fourth respondents respectively. The applicant herein was not a party to those proceedings. FOROMA J grated the following interim relief:

> "That pending the determination of the Application to set aside the sale in execution under Case Number HC 1840/21, the Applicant is granted the following relief:-
> 1. The 1st Respondent is directed to stop transferring and/or delivering the gold processing plant and all the movable properties sold in execution at Antelope 1 Registration Number 19413 Bobs Area, Kwekwe to any 3rd parties in terms of the writ of execution issued under Case Number HC 1840/21 until determination of the application to set aside the sale in execution under case number HC 4387/23.
> 2. The First Respondent shall not execute the writ of attachment procured under HC8041/21 until this matter is resolved.
> 3. No order as to costs."

Thus the provisional order granted by FOROMA J had the effect of suspending any transfer of title in the equipment pursuant to the writ of attachment under HC 1840/21, pending the determination of the application to set aside the sale in execution that was borne out of the

attachment of the third respondent's property. Proceedings under HC 4415/23 are still pending before this court.

**First respondent's case**

The opposing affidavit raised the following in *limine:* lack of urgency; use of wrong procedure; non-joinder of material parties, to wit, the judgment creditor and the judgment debtor in HC 1840/21. As regards the merits, it was averred that the sale was lawfully cancelled for breach. The terms and conditions of the sale were not complied with. The first respondent also averred that the requirements for the granting of an interdict had not been satisfied. No conceivable prejudice would be suffered by the applicant were the interdict to be declined.

**Third respondent's case**

The opposing affidavit raised the following in *limine;* absence of *locus standi*; that the application was fatally defective; lack of urgency; that the application was an abuse of court process and that the certificate of urgency was fatally defective. The last two were abandoned following exchanges between the third respondent's counsel and the court.

Concerning the merits, it was averred that the provisional order sought by the applicant as the alternative to the *declaratur* had already been granted in the proceedings in HC 4415/23, albeit under different circumstances. The relief sought on the return date could not be granted as the sale was conducted in contravention of the insolvency laws and the rules governing public auctions. The equipment that was purportedly sold belonged to the third respondent which entity was under corporate rescue.

It was further averred that the applicant had an alternative remedy as it could seek its joinder in the proceedings under HC 4415/23. The order already granted by FOROMA J directly affected the equipment that the applicant had an interest in.

**THE SUBMISSIONS AND THE ANALYSIS**

***Locus standi***

It is critical to dispose of the issue of the applicant's locus *standi* at the outset lest there is no applicant before the court. Ms *Chatsama* for the third respondent submitted that the second highest bidder was one Willard Manyika, as per the communication from the first respondent. The proper applicant was therefore Willard Manyika and not the present applicant. In its replying affidavit, the applicant submitted that Willard Manyika made the bidding on behalf of the applicant

as its general manager. He acted as the authorized representative of the applicant. It was the applicant paid the eligibility deposit to the second respondent in order to participate in the auction. The proper applicant was therefore the presently cited applicant and not Willard Manyika.

Having carefully considered counsels submission, I found no merit in the preliminary objection. While the first respondent's letter of 7 July 2023 referred to Willard Manyika as the second highest bidder, that letter must not be read in isolation. All the payments made to either the first or second respondents towards discharging the financial obligations arising from the auction were made either by the applicant or on behalf of the applicant. The cash deposit of US$1000 which was one of the conditions of the auction sale, was paid directly to the second respondent by the applicant. The court therefore determines that the applicant has the requisite *locus standi* and is properly before the court.

***Urgency***

Mr *Mugandiwa* for the first respondent submitted that the matter was not urgent for the following reasons. The main relief sought a *declaratur*. Such relief was final in nature. In terms of s 14 of the High Court Act[1], such relief was only granted pursuant to an approach to the court and not to a judge in chambers. As regards the alternative relief for the provisional order, it was submitted that the same equipment was the subject of another order of this court granted in HC 4415/23. There was no risk of the equipment being disposed of since the first respondent was bound by that order.

There was also an averment made by the applicant that the purchase of the equipment was financed by a loan that the applicant received from a third party. The applicant was therefore suffering financial loss owing to its inability to put the equipment to commercial use. Such loan was allegedly accruing interest. There was also the attendant risk of losing the purchase price should the sale be cancelled. In response to these averments, Mr *Mugandiwa* for the first respondent submitted that there was no nexus between the loan and the sale. The loan agreement had been consummated long before the sale. That loan had not been advanced to the applicant, but to an entity called Floshawn Investments (Private) Limited. The purpose of the loan was capital expenditure for catering equipment and not mining equipment. The risk of losing the purchase

[1] [*Chapter 7:06*]

price was farfetched because the first respondent had already tendered a refund of the purchase price. The applicant had not been willing to furnish its banking details.

There was also the averment that the applicant's property rights as enshrined in s 71 of the Constitution had been infringed upon by the first respondent's conduct of cancelling the sale yet the full purchase price had been paid. Mr *Mugandiwa* submitted that no property rights were infringed as the applicant never acquired ownership rights in the equipment. The full purchase price was only paid after the agreement of sale had been cancelled. The factors cited as justifying urgency did not make a case for adopting the procedure of an urgent application. The court was urged to strike the matter off the roll as the matter was clearly not urgent.

Ms *Chatsama's* submission on urgency was confined to one consideration. It was that there was already any order of this court in HC 4415/23 whose effect was to preserve the status *quo* pending the determination of the court challenges made by the third respondent involving the same equipment. There was no need for this court to grant a duplicate order when there was already one in existence. The applicant was not exposed to any prejudice which warranted an urgent hearing of the matter.

In its reply, the applicant insisted that the matter was urgent. The rights of the applicant could only be preserved through an approach to this court on an urgent basis. It was further submitted that the provisional order granted by the court in HC 4415/23 was only beneficial to the third respondent and not the applicant. The first respondent could still proceed to dispose of the movable assets in breach of the applicant's rights.

The question of urgency is intertwined with another preliminary point raised by both respondents. It is the propriety of the procedure adopted by the applicant herein. Their contention is that the applicant cannot seek both a *declaratur* and an interdict in one fell swoop. Such a procedure was alien to the rules of this court. The respondents are right. The application before me bears all the hallmarks of what has come to be known as the proverbial dog's breakfast. What was supposed to be a simple application for an interdict pending the return date on which day certain *declaraturs* would have been sought was all convoluted to create some hybrid application which may probably be the first of its kind in this court.

The heading describes the application as an "URGENT CHAMBER APPLICATION FOR A DECLARATUR ALTERNATIVELY AN INTERIM INDERDICT PENDING THE

DETERMINATION OF THE RIGHTS OF THE PARTIES ON THE RETURN DAY". That same description is repeated in paragraph 1 of the certificate of urgency. Paragraph 11 of the certificate of urgency relates to the alternative remedy as follows:

> "The alternative relief that the Applicants seek is an interdict arising from the violation of clear rights emanating from the contract of sale that the parties entered into……."

Paragraph 12 of the certificate of urgency further states:

> "There are no other remedies open to the Applicant in order to protect itself, from any further advertising by the 1st Respondent except for an Interdict in the interim pending determination of the application for declaratur and rights emanating from the contract of sale. The Applicant will suffer irreparable harm should there be a sale or another auction before its application for declaration is heard before the return day."

The disorderliness is further manifested in para(s) 19, 20 and 21 of the founding as follows:

> "**NATURE OF THE APPLICATION**
> 19. This is an **URGENT CHAMBER APPLICATION FOR A DECLARATUR AND ALTERNATIVELY AND INTERIM INTERDICT PENDING DETERMINATION OF THE RIGHTS OF THE PARTIES ON THE RETURN DAY** seeking the court to declare the cancellation of the sale by the 2st Respondent between the Applicant and Respondents, be declared null and void.
> 20. In the alternative the Applicant seeks an interim order to interdict 1st Respondent is directed to stop transferring delivering, auctioning, advertising for sale, of the movable property sold in execution on the 1st of July 2023 at Antelope 1 registration number 19413 Bobs Area, Kwekwe namely a processing plant consisting of……and that the 2nd Respondent is directed to stop auctioning the movable property paid for in full by the Applicant.
> 21. On the date of return the Applicant will seek an order declaring that the Respondent sale on the 1 of July 2023 by the Respondents be and is hereby declared valid and the purported cancellation be and is hereby declared invalid."

Now here is the puzzlement. The main claim is clearly one for a *declaratur*. The separate draft order which is part of the record attests to that position. The alternative claim is for an interim interdict. The terms of the final order sought are certain *declaraturs* which are similar to the *declaraturs* sought in the separate draft order for the *declaratur*. The same application therefore seeks a *declaratur* at two levels. Firstly as its main claim in which case the court must grant a final order. The second level is the alternative claim in which the *declaratur* is sought on the return date as terms of the final order sought.

But from a reading of the paragraphs cited above, one is again left with the impression that there is a separate application for a *declaratur* that does not form part of the present matter. It would appear that the present application was intended to forestall any perceived harm pending

the determination of that separate application for a *declaratur*. But that is not the situation on the ground. The application for the *declaratur* referred to is the same application that is before this court. All that confusion arises as a result of the inelegant manner in which the papers before the court were prepared.

Courts are ordinarily chary about needlessly elevating form over substance. See in this regard *Trans Africa Insurance Co Ltd* v *Maluleka*[2] and *Kaisa Nguwo & Another* v *Maria Peno & Another*[3]. The court would have easily overlooked the appellation that accompanied the application for as long as it did not detract from the substance of the matter as pleaded in the founding affidavit and the accompanying documents. The founding affidavit pleads the case for a *declaratur* in the main, and an interim interdict in the alternative. As already noted, what is before the court is some kind of hybrid application in which a *declaratur* and an interim interdict are sought. In the mind of the applicant, the court can grant a *declaratur* on an urgent basis. That is a procedural infraction that cannot be condoned.

Mr *Zhuwarara* for the applicant urged the court to overlook the reference to the *declaratur* as the main claim, arguing that from a reading of the founding affidavit, the *declaratur* was only sought on the return date. That submission is implausible. Such a robust approach is clearly untenable in the circumstances of this case. The contents of the founding affidavit are not severable. Neither can the court be enjoined to apply the proverbial blue pencil test to strike out the unwanted words. Any retraction from the contents of the founding affidavit could only be achieved through filing a supplementary affidavit. What is before the court is a hybrid application, which in both form and substance combines two forms of relief that are unattainable through the procedure of an urgent chamber application.

The main relief sought is a *declaratur* which was accompanied by a draft order that was not expunged from the record. That alone takes the matter outside the ambit of urgent matters. The applicant should have simply confined its application to an interdict and seek the *declaraturs* on the return date. Unfortunately the papers before the court suggest a contrary intention. One is

[2] 1956 (2) SA 273 AD at 278
[3] HB 214/16 at page 3

justified in concluding that the applicant was clearly on a fishing expedition. Its preoccupation was to obtain relief by way of a *declaratur* as expeditiously as was possible.

In the final analysis, the court determines that the application is not urgent since it seeks the main relief of a *declaratur* by way of an urgent chamber application, instead of an ordinary court application. The court also determines that the application is fatally defective to the extent that it seeks relief of a *declaratur* and in the alternative an interim interdict through the medium of an urgent chamber application. Such hybrid procedure is alien to this jurisdiction. The application therefore not only lacks urgency, but it is also incurably bad.

Resultantly, it is ordered that:

1. The application is struck off the roll of urgent matters.
2. The applicant shall pay the first and third respondents' costs of suit.

*Hamunakwadi & Nyandoro*, applicant's legal practitioners
*Wintertons*, first respondent's legal practitioners
*Chatsama & Partners*, second respondent's legal practitioners